

**STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION**

**City of Nashua Taking Of:**

**Pennichuck East Utility, Inc.  
Pittsfield Aqueduct Company, Inc.  
Pennichuck Water Works, Inc.**

**Docket No. DW 04-048**

**PENNICHUCK EAST UTILITY, INC., PITTSFIELD AQUEDUCT COMPANY, INC.  
AND PENNICHUCK WATER WORKS, INC.'S MOTION TO DISMISS IN FULL OR IN  
PART OR, ALTERNATIVELY, TO STAY PROCEEDING**

Pennichuck East Utility, Inc. ("PEU"), Pittsfield Aqueduct Company, Inc. ("PAC") and Pennichuck Water Works, Inc. ("PWW") hereby move the Public Utilities Commission to dismiss the city of Nashua's ("City") Petition for Valuation Pursuant to RSA 38:9 filed with the Commission on March 25, 2004 or, alternatively, to stay this proceeding. In support of their motion, PEU, PAC and PWW state as follows:

1. PEU is a New Hampshire corporation formed in 1998. PEU has been granted operating authority by this Commission to provide water service in some or all of the municipalities of Atkinson, Derry, Hooksett, Litchfield, Londonderry, Pelham, Plaistow, Raymond, Sandown and Windham. PEU serves approximately 4,426 customers in the foregoing towns.

2. PAC is a New Hampshire corporation formed in 1997. PAC has been granted operating authority by this Commission to provide water service in a portion of the town of Pittsfield. PEU serves approximately 642 customers in the town of Pittsfield.

3. PWW is a New Hampshire corporation formed in 1852. PWW has been granted operating authority by this Commission to provide water service in some or all of the municipalities of Amherst, Bedford, East Derry, Epping, Hollis, Merrimack, Milford, Nashua, Newmarket, Plaistow and Salem. PWW serves approximately 24,267 customers in the foregoing municipalities.

**I. The City's Petition Should Be Treated As Three Separate Eminent Domain Proceedings, Two of Which Should Be Dismissed in Their Entirety.**

4. The City's petition in this case requests that the Commission determine the fair market value of the property of PEU, PAC and PWW in order to enable the City to take the property of those companies.

5. Despite the fact that PEU, PAC and PWW are separate legal entities, each with its own assets, its own service territories and its own corporate and legal history, the City included all three entities in a single petition that seeks to obtain the right to take all of their assets by eminent domain. The City's attempt to consolidate these three separate legal proceedings into one ignores the important differences among these entities, specifically the differences in the legal and factual issues governing the City's efforts to take their assets.

6. The legal and factual issues in these cases are plainly separate and distinct and may result in different determinations in each of the cases. For example:

a. Nashua's efforts to take the assets of PAC are subject to a competing municipalization effort currently being undertaken by the Town of Pittsfield. *See* Letter from Pittsfield Selectmen attached as Exhibit A.

b. Neither PEU nor PAC provides water service in the city of Nashua, nor have they ever done so, nor are they authorized to provide such service.

c. Neither PEU nor PAC owns any property in the city of Nashua.

d. The communities served by PEU have not taken the necessary votes regarding municipalization, and therefore there is no evidence at all regarding the "public interest" presumption referred to in the City's petition. Undoubtedly, residents of the ten communities served by PEU would not agree that a vote by Nashua residents provides a legitimate basis for determining what is in the public interest of their own communities.

e. It is unknown, and at this point unknowable, whether the communities served by PAC and PEU will ultimately join the regional water district referred to by the City in its petition, assuming that such an entity is ever formed at all. On information and belief, a number of the communities that are served by PEU are not even participating in the discussions regarding the charter of the proposed regional water district.

7. The City's efforts to consolidate these three proceedings from the outset and ignore the fact that PAC, PEU and PWW are separate legal entities will unnecessarily confuse the legal and factual issues that need to be resolved in these distinct matters. At a minimum, the Commission should sever the three matters into separate dockets and leave open the possibility that the three proceedings will follow separate tracks depending on the development of legal and factual issues in these cases.

8. To the extent that the City has any authority at all under RSA Ch. 38 to attempt to take the assets of PWW by eminent domain, there is absolutely no basis for it to take assets of companies that do not provide service in Nashua and own no property there. The fact that the corporations may have a common shareholder is insufficient to enable the City to make such a leap. The Commission's jurisdiction under RSA Ch. 38 does not extend to attempted takings by municipalities from an entity that does not provide service within the condemnor's municipal boundaries. The City's efforts to improperly extend the reach of RSA Ch. 38 to include such a taking is wholly without basis.

9. In addition, by attempting to take utility assets located in other municipalities, the City presumes that it may preempt the right of other municipalities to exercise their own RSA Ch. 38 rights to eminent domain. The City has no authority, under RSA Ch. 38 or otherwise, to do so.

**II. The City Failed to Comply with the Requirements of N.H. Code of Admin. Rules Puc 202.11 and 204.01 and, Therefore, Its Petition Should Be Dismissed.**

10. N.H. Code of Admin. Rules Puc 202.11(a) provides that "[a]ll petitions shall be accompanied by prefiled testimony and exhibits."

11. N.H. Code of Admin. Rules Puc 204.01(b) provides that "[w]ith the exception of petitions to intervene, petitions shall be accompanied by written testimony sworn to by the witness." The rule then specifies the material that is to be included in such prefiled testimony and the information that is required to support a petition to the Commission.

12. N.H. Code of Admin. Rules Puc 201.05 provides a specific process by which any party may seek a waiver of the Commission's rules if it believes that the rules would be burdensome or do not apply for some reason.

13. In this case, the City neither complied with the clear requirements of Puc 202.11 or 204.01, nor did it make any attempt to seek a waiver pursuant to Puc 201.05.

14. The City's failure to comply with the Commission's rules is more than a technical oversight on its part. The City rushed to file its petition with the Commission in order to attempt to legitimize the public threats it has been making against Pennichuck Corporation, the parent company of PAC, PEU and PWW, since November 2002 when the City's Aldermen first voted to pursue the taking.

15. It is remarkable that the City was unable to comply with the Commission's filing requirements, given that it has been contemplating this action for over a year. As long ago as March 26, 2003, in a letter to the Pennichuck utilities, the City stated that it "will *now* proceed

under RSA 38:10 to petition the Public Utilities Commission in order to complete the acquisition of the plant and property specified in Nashua's letters sent earlier under RSA 38:6." *See* letter from City of Nashua dated March 26, 2003, attached as Exhibit B (emphasis added). And just last month, the City's attorney informed the Nashua Aldermen that the City's petition was "already prepared and is ready to file." *See* excerpt from transcript of March 16, 2004 meeting of Nashua Budget Review Committee ("Budget Comm. Transcript") attached as Exhibit C. Not only was the petition prepared in advance, the City's consultant, as he told the Aldermen at the March 16 meeting, had already developed "some very hard numbers on what that purchase is going to look like and why those numbers are the price." *See* Budget Comm. Transcript attached as Exhibit D.

16. The City has posited no reason why it could not have complied with the Commission's rules. The City's failure to comply with those rules is particularly suspect given the long history of this case prior to its filing with this Commission. Incredibly, the vast majority of the documentation included with the City's filing is simply a copy of the materials previously filed in New Hampshire Superior Court by *Pennichuck Corporation and its subsidiaries*, rather than the type of factual and legal support required by Puc 202.11 and 204.01.

17. Without the additional facts that are a necessary part of the City's direct case in this proceeding, it is impossible to know exactly what assets the City is seeking to take, whether the City has the legal authority to take those assets (including whether the assets are even included within the scope of the vote taken by the citizens of Nashua in January 2003), what amount the City is proposing to pay for the assets it is attempting to take and the basis for that value, and numerous other matters.

18. The City's petition appears to be nothing more than a place holder, either to buy time to allow the City to prepare its case further or to respond superficially to the issues raised in

the litigation pending in New Hampshire Superior Court regarding the City's prior bad faith attempts to take Pennichuck Corporation and/or its utility subsidiaries. Perhaps the best evidence of the fact that the petition is merely intended to buy time is the fact that the entity to which Nashua says it intends to transfer the assets of PAC, PEU and PWW *does not yet exist* (and may never exist), yet it is the very existence of that entity and the intended transfer of assets to it that, according to the City, will support a finding by this Commission that the proposed taking is in the public interest.

19. At best, Nashua's petition is grossly premature. At worst, it was filed in bad faith and there is no factual or legal basis that can support the proposed taking. In either case, the petition should be dismissed in its entirety for failure to comply with the Commission's rules.

### **III. The City's Petition Should Be Dismissed Because the Regional Water District to Which the City Claims It Intends to Transfer the Utility Assets Does Not Exist.**

20. Given the City's reliance on the creation of a regional water district to support its claim that the proposed taking is in the public interest, it is clear that the City's petition is premature and should be dismissed.

21. In order to assess the City's public interest claim, the Commission will need to know, among other things, which municipalities currently served by PAC, PEU and PWW are members of the district. At this point, not only is the membership of the water district unknown, the very existence of the district is in doubt.

22. Because the water district does not yet exist, there is no way for the Commission to determine who the owner of the assets to be taken will be or whether the proposed owner has the technical, managerial and financial ability to provide water service consistent with the quality delivered by PAC, PEU and PWW. A determination of public good will require the Commission, at a minimum, to determine that the new owner will be able to provide the same or better service than PAC, PEU and PWW. Simply put, the Commission cannot conduct a public

interest analysis without knowing who will own and operate the water systems in the twenty-two communities served by PAC, PEU and PWW and, in fact, it is a near certainty that many of the municipalities involved would have a very different position on whether the taking should go forward at all depending on whether the ultimate owner was the City of Nashua rather than a regional district.

23. Because the basic facts relied on by the City and necessary to resolve its petition have yet to be determined, the Commission should not proceed in this matter and should instead dismiss it in its entirety.

**IV. To the Extent that the Commission Determines that Any Portion of this Proceeding Should Not Be Dismissed, the Commission Should Stay the Proceeding Until the Superior Court Rules on the Declaratory Judgment Petition.**

24. On February 4, 2004, Pennichuck Corporation, PEU, PAC and PWW filed a petition for declaratory judgment in the Hillsborough County Superior Court, Southern District, Docket No. 04-E-0062 (the "Superior Court Litigation"), seeking that Court's intervention to protect Pennichuck Corporation and its regulated utilities' constitutional rights. The return date in the Superior Court Litigation is April 6, 2004.

25. The Superior Court Litigation raises a host of claims that could dispose of the City's petition without the need for the Commission to undertake what is certain to be a long and intensive proceeding regarding complex legal and factual matters, a proceeding that is likely to be exceedingly costly for the parties and potentially for the Commission. For example, the declaratory judgment petition in the Superior Court Litigation requests that the Court declare RSA 38:9-11, the very provisions invoked by the City in this proceeding, unconstitutional and violative of the three utilities' fundamental rights under Pt. 1, Article 12 of the New Hampshire Constitution because the statute does not provide for a trial by jury, a right that exists in other condemnation actions. In addition, the Superior Court Litigation will address the

constitutionality of the process set forth in RSA 38:1-13, including whether those provisions have resulted in an inverse condemnation of the utilities' assets without compensation.

26. In addition to addressing these constitutional infirmities, the Superior Court will also be determining whether the City is even authorized to bring the action that it has now filed with this Commission, given the City's failure to promptly file an RSA Ch. 38 proceeding with the Commission, and given that the provisions of RSA Ch. 38 do not appear to provide the City with the necessary authority to take assets in municipalities that are served by water systems that are not even physically connected to the system that serves Nashua and, in many cases, are owned by companies that do not provide utility service in Nashua.

27. Because the Superior Court Litigation directly implicates the process to be employed by the Commission in this matter and the legitimacy of the docket itself, it would be wasteful and inefficient for the Commission to proceed prior to a definitive ruling by the Superior Court. The additional expense of litigating this matter before the Commission, when a ruling from the Superior Court could dispose of the matter in its entirety, would also place an unnecessary burden on PAC, PEU, PWW and their customers. Such a use of public and private resources is not in the public interest.

28. For these reasons, PAC, PEU, and PWW request that, to the extent that the Commission does not otherwise dismiss any of Nashua's claims, any and all remaining dockets related to this matter be immediately stayed pending final determination by the New Hampshire Superior Court in Docket No. 04-E-0082 and any appellate rights that flow therefrom.

WHEREFORE, Pennichuck East Utility, Inc., Pittsfield Aqueduct Company, Inc. and Pennichuck Water Works, Inc. respectfully requests that the Commission:

A. Sever Nashua's petition into three separate dockets;



B. Dismiss Nashua's petition with regard to PAC and PEU on the basis that Nashua has no authority to take the assets of those companies pursuant to RSA Ch. 38 and the Commission has no jurisdiction to hear such a proceeding;

C. Dismiss Nashua's petition with regard to PAC, PEU and PWW on the basis that Nashua failed to comply with the requirements of N.H. Code of Admin. Rules 202.11 and 204.01 and/or that Nashua's petition is premature;

D. Alternatively, stay this proceeding pending final resolution of the Superior Court Litigation; and

E. Grant such other and further relief as may be just and equitable.

Respectfully submitted,

Pennichuck East Utility, Inc.  
Pittsfield Aqueduct Company, Inc.  
Pennichuck Water Works, Inc.

By Their Attorneys

MCLANE, GRAF, RAULERSON & MIDDLETON, P.A.

April \_\_, 2004

By: \_\_\_\_\_  
Thomas J. Donovan, Esq.  
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#### CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion has been forwarded to F. Anne Ross, Esq., Consumer Advocate, and Robert Upton, II, Esq. and David R. Connell, attorneys for the City of Nashua.

Dated: April \_\_, 2004

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Steven V. Camerino